CURCIO

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Avondale Industries, Inc.

File: B-237874

Date: March 22, 1990

Richard J. Conway, Esq., Dickstein, Shapiro & Morin, for the protester.
William F. Ragan, Esq., Ragan & Mason, for Tampa Shipyards, Inc., an interested party.
Fred L. Sheridan, Department of the Navy, for the agency.
Mary G. Curcio, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the decision.

DIGEST

1. Protest that contracting agency improperly awarded a sole-source contract on industrial mobilization base grounds to complete a terminated shipbuilding contract, after requesting quotations from other firms to perform the reprocurement contract, is denied since even if request for quotations constituted a competitive solicitation, agency properly could cancel it and make the sole-source mobilization base award.

2. Protest that contracting agency improperly awarded a sole-source contract on mobilization base grounds is denied where record shows that agency properly exercised its discretion in deciding that award was necessary to protect the industrial mobilization base.

DECISION

Avondale Industries, Inc., protests that the Department of the Navy improperly awarded contract No. N00024-90-C-2300 to Tampa Shipyards, Inc., to complete the construction of two T-AO 187 class fleet oiler ships.

We deny the protest.

The two ships which are the subject of this protest were to be constructed by Pennsylvania Shipbuilding Co. (PennShip), under a contract which was awarded to PennShip in 1985. In November 1988, PennShip informed the Navy that it would be

unable to complete the two ships; in March 1989, PennShip and the Navy agreed that the Navy would terminate PennShip's contract for default and pursue the award of a reprocurement contract to complete the ships. The Navy and PennShip negotiated the terms of the termination for default and PennShip's contract ultimately was terminated in August 1989.

On April 6, 1989, the Navy issued a letter to Bethlehem Steel Corporation, Baltimore Marine Division; Avondale; and Tampa Shipyards, Inc., requesting the submission of quotations to complete the two ships. While the Navy was reviewing the quotations, it also was considering whether to award the reprocurement contract on the basis of low price or to develop an additional source for large auxiliary ships for the defense mobilization base. In this regard, in June 1989, the Navy began a review of the shipbuilding industrial base. The Navy had previously analyzed the industrial base in December 1988, and based on the facts at that time concluded that an additional source was not needed for the mobilization base.1/ The June 1989 review, however, showed that National Steel and Shipbuilding Company (NASSCO), one shipyard involved in building the type of ship at issue, which previously was owned by a large conglomerate, Morrison-Knudsen Co., was now employee-owned. The analysis also showed that Congress was considering authorizing and appropriating funds for a significant new shipbuilding program, the Fast Sealift Program. Based on these facts, the Secretary of the Navy decided that award of the reprocurement contract should be made to Tampa in support of the mobilization base.

The Secretary communicated this decision to the Special Procurement Executive who, on November 16, 1989, executed a Justification and Approval (J&A) for the award to Tampa. The J&A found that:

--1. Since NASSCO was no longer a subsidiary of Morrison-Knudsen Co., and therefore no longer had its parent's financial support, it was no longer as solid a competitor for large auxiliary ships in the long term.

1/ The December 1988 analysis was prepared in response to a direction from Congress that the Navy assess the shipbuilding industrial base and submit a procurement strategy for the three remaining ships in the T-AO 187 Class Fleet Oiler Program.

--2. If NASSCO ceased being a competitor, Avondale would be the sole remaining source for large auxiliary ship construction.

--3. The positions of Bethlehem Steel, Tampa and PennShip, the three potential shipyards other than Avondale and NASSCO, had markedly deteriorated since the December 1988 analysis of the industrial base.

--4. If Congress appropriated funds for the Fast Sealift Program, it could create more work than NASSCO and Avondale could handle. Also, the reprocurement contract could serve as a bridge for Tampa to new work under the Fast Sealift Program.

--5. An award to Tampa on the basis of the industrial mobilization base would involve a premium of $6 million, or less than 5 percent of the total program cost. In comparison, the premium involved in the contract being considered in the December 1988 analysis was $30 million per ship.

Avondale first protests that the Navy improperly awarded the sole-source contract to Tampa on industrial mobilization grounds after soliciting competitive quotations pursuant to the April 6 letter. Avondale argues that once the Navy requested quotations, it was required to either conduct a fully competitive procurement with an evaluation factor allowing for a mobilization base award, or to amend the letter to reflect that quotations could be disregarded and an award made on the basis of the mobilization base.

The Navy replies that the April 6 letter was not a solicitation under which an award could be made. Rather, the Navy argues, the letter was issued so that it could obtain information to help it decide how to conduct the reprocurement for the ship construction.

Whether or not the April 6 letter is properly characterized as a solicitation would not bear on the propriety of the Navy's award to Tampa. A procuring agency is permitted to cancel a negotiated procurement when it has a reasonable basis to do so. National Presto Indus., Inc., B-195679, Dec. 19, 1979, 79-2 CPD ¶ 418. A determination after issuing a solicitation that an award should be made on mobilization base grounds provides a reasonable basis to cancel a solicitation and resolicit the requirement. Id. Thus, once the Navy determined that the award should be made on mobilization base grounds, it properly could have canceled the solicitation and awarded the contract to Tampa on that basis. Consequently, there is no basis for our

Office to disturb the award to Tampa if the mobilization base determination is otherwise proper. See Cemsco, Inc., B-180335, June 3, 1974, 74-1 CPD ¶ 295.

Avondale also protests that the award to Tampa on industrial mobilization base grounds is improper because the J&A justifying the award is legally and factually insufficient. Specifically, Avondale cites the prior industrial mobilization base analysis performed in December 1988 in connection with the awards for three additional ships in the T-AO 187 Class Program. As noted above, that analysis concluded that industrial mobilization base considerations did not warrant award of the additional ships on the basis of other than lowest cost. Avondale argues that the changed circumstances relied on by the Navy to justify its subsequent decision to make award to Tampa due to mobilization base concerns--principally, that NASSCO is now employee-owned rather than a subsidiary of Morrison-Knudsen Co., and that Congress has appropriated funds for the new Fast Sealift Program--do not support the decision to award the reprocurement contract to Tampa.

Concerning NASSCO, Avondale argues that the change in ownership cannot support the J&A because at the time of the December 1988 analysis, the Navy knew that Morrison-Knudsen Co. was going to divest itself of NASSCO and that, in any case, NASSCO still is a viable member of the industrial mobilization base. In addition, Avondale notes that the Navy recently exercised an option on an existing NASSCO contract and agreed to reduce the guarantee Morrison-Knudsen Co. previously had provided on that contract; in Avondale's view, these actions are inconsistent with the concerns expressed in the J&A about NASSCO's status as a viable shipbuilder.

Concerning the Fast Sealift Program, Avondale argues that the Navy opposes the program and has no intention of implementing it, and, in fact, ultimately deferred funding for the program after it was appropriated by Congress. As a result, Avondale argues, the Navy could not reasonably rely on the industrial base as a justification for award to Tampa.

Avondale also disputes the remainder of the findings which support the J&A. Specifically, Avondale argues that because the reprocurement contract will last for only 2 years, and the Fast Sealift Program will take longer than 2 years to commence, the award to Tampa will not serve as a bridge to new work for Tampa, as the Navy maintains. Finally, Avondale argues that the Navy erroneously determined that Avondale will be the sole remaining source for large

auxiliary ships if NASSCO goes out of business because the Navy failed to consider other available shipyards.2/

The Navy responds that the facts as they existed in November 1989, when the J&A was executed, support the mobilization base award to Tampa. The Navy states that while it learned in November 1988 that Morrison-Knudsen Co. intended to divest itself of NASSCO, at that time Morrison-Knudsen Co. was considering a number of options to accomplish this end, and it was not until March 1989 that the Navy knew that NASSCO would be sold to its employees. The Navy also explains that while it believes that NASSCO will remain viable in the short-term, in the Navy's judgment the loss of unlimited Morrison-Knudsen Co. financial backing makes NASSCO's status as a future competitor less certain.

The Navy also reports that it was only after the December 1988 mobilization base analysis was completed that it learned that Congress was likely to authorize and appropriate funds for the Fast Sealift Program. The Navy believed that this program would create sufficient work for an additional shipbuilder, and that the reprocurement award to Tampa would maintain Tampa as a viable competitor for the new work. Insofar as Avondale argues that the Navy deferred this program, the Navy indicates that the decision to defer the program was made in response to a request from the Department of Defense to review programs for possible deferral action, and that, in any event, the Navy's opposition to the program in no way ensured that it would not be implemented.

The Navy next asserts that it did consider the availability of other shipyards. In this regard, concerning two of the companies identified by Avondale, Newport News and Ingalls, the Navy explains that historically shipbuilders focus their attention on "product lines." Thus, Newport News has engaged solely in building Navy nuclear-powered ships, and Ingalls has engaged solely in building surface combatant ships. According to the Navy, neither of these firms has shown any serious interest in competing for large auxiliary new ship construction, and the Navy has no reason to believe that this will change. Concerning the third firm, Trinity Beaumont, the Navy explains that it did not consider the

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2/ In its initial protest, Avondale also argued that the award to Tampa was the result of improper Congressional influence. In its report on the protest, the Navy persuasively rebutted this allegation. Since Avondale did not respond to the Navy's rebuttal in its comments on the agency report, we will not consider the issue further.

firm because Trinity only recently purchased a shipbuilding facility capable of constructing T-AO size ships and the facility had not yet been placed in operation at the time the J&A was executed.

Finally, the Navy reiterates that the premium involved in awarding the reprocurement contract to Tampa is $6 million, or less than 5 percent of the total cost of the delivered ship, while in December 1988, the premium involved would have been $30 million per ship.

Military agencies have authority to conduct procurements in a manner that enables them to establish or maintain sources of supply for a particular item in the interest of national defense. See 10 U.S.C. §§ 2304(b)(1)(B) and 2304(c)(3) (1988). These agencies need not obtain full and open competition where the procurement is conducted for industrial mobilization purposes, and may use other than competitive procedures where it is necessary to award the contract to a particular source or sources. Propper Int'l, Inc., B-229888, B-229889, Mar. 22, 1988, 88-1 CPD ¶ 296. Therefore, although it is our policy to scrutinize closely procurement actions using other than competitive procedures, it is also our view that since the normal concern of maximizing competition is secondary to the needs of industrial mobilization, decisions as to which and how many producers are in the mobilization base involve complex judgments which must be left to the discretion of the military agencies. Minowitz Mfg. Co., B-228502, Jan. 4, 1988, 88-1 CPD ¶ 1. Our Office will question those decisions only if the record convincingly establishes that the agency abused its discretion. Id.

Here, Avondale's protest--that the Navy's decision to award the contract to Tampa on mobilization base grounds is not based upon substantial and accurate facts--is in essence an allegation that the agency abused its discretion in awarding the contract to Tampa. As discussed below, under the narrow standard of review that we apply in these cases, we see no basis to object to the Navy's decision.

The November 1989 J&A explains that the Navy's prior analysis of the industrial base in December 1988 concluded that a mobilization base award was not required at that time because of the existence in the base of Avondale and NASSCO, two viable competitors for the type of ship at issue. In light of the subsequent change in ownership of NASSCO, however, the J&A states that unless NASSCO increases its productivity and obtains new work, its status will be in jeopardy after 2 years. Further, the J&A notes that the Fast Sealift Program would generate more work that Avondale

and NASSCO together could handle. In view of these factors, the J&A concludes that award to Tampa of the reprocurement contract will ensure that firm's viability for the near term, so that, if NASSCO is not able to compete effectively in 2 years, or the work required exceeds the combined capacity of Avondale and NASSCO, there will be an alternate source available in Tampa.

In reviewing the J&A, the important factor is whether the facts, as they existed in November 1989, support the Navy's decision to award the contract to Tampa on mobilization base grounds. In this regard, there is no dispute that in November 1989, NASSCO was employee-owned rather than a subsidiary of Morrison-Knudsen Co., and in our view, there was nothing improper in the Navy concluding that the loss of Morrison-Knudsen Co.'s financial backing cast doubt on NASSCO's viability as a competitor in the long term. Further, neither the Navy's decision to exercise an option on an existing NASSCO contract, nor its decision to terminate the Morrison-Knudsen Co. guarantee on that contract, contradict this position since the Navy's concern was with NASSCO's future status and not with NASSCO's ability to complete its present workload. In addition, we find persuasive the Navy's position that while it knew of Morrison-Knudsen Co's. general divestment plan in November 1988, before the December 1988 industrial base analysis was prepared, it was not until the actual change to employee ownership occurred in March 1989 that the Navy properly could assess the effect of the change on NASSCO. Thus, the fact that the plan to divest was not considered a factor in the December 1988 analysis does not reflect on the propriety of the Navy's conclusion in the J&A that, in light of subsequent events, NASSCO's viability in the long term had been called into question.

Further, the fact that the Navy later chose to recommend the Fast Sealift Program for deferral does not change the fact that at the time the J&A was executed, it was likely that Congress would authorize and fund the program, and the Navy reasonably believed the program would place a burden on the shipbuilding industrial base and potentially create enough work to require an additional shipbuilder. In this regard, Avondale's disagreement with the Navy's position that award of the reprocurement contract will help Tampa remain a viable shipbuilder for work under the Fast Sealift Program does not demonstrate that the Navy's decision is unreasonable.

Finally, the record does not contain any evidence to contradict the Navy's conclusion that if NASSCO ceases to operate, Avondale will be the sole contractor for large

auxiliary ship construction. While Avondale argues that Newport News and Ingalls are also available, there is nothing to suggest that either of these shipyards would be interested in constructing the type of ship at issue; nor is there any indication as to when and if the third firm, Trinity Beaumont, will be available to construct the type of ship in question.

Given these findings, we have no basis to conclude that the Navy improperly awarded the contract to Tampa on industrial mobilization base grounds.

The protest is denied.

for James F. Hinchman
General Counsel